ANNUAL REPORT

for the period **October 1, 2000** to **September 30, 2001**

NOVA SCOTIA
FREEDOM OF INFORMATION
AND PROTECTION OF PRIVACY
REVIEW OFFICE

Nova Scotia Freedom of Information and Protection of Privacy Review Office

October 15, 2001

The Honourable Murray Scott
Speaker
The Legislative Assembly
Province of Nova Scotia

Sir:

In accordance with section 33(7) of the **Nova Scotia Freedom of Information and Protection of Privacy Act**, I am pleased to present to you, and through you to the Members of the Legislative Assembly, the Annual Report of the Review Officer for the twelve month period October 1, 2000 to September 30, 2001.

Respectfully submitted,

Darce Fardy
Review Officer

TABLE OF CONTENTS

I Introduction 1

II Review Officer's Message - Access 1

1. The FOIPOP Administrators 1
2. Review Office's Information Sessions 3
3. Legal Counsel 3
4. Fees 4
5. Public Body Response to Applicants 4
6. Responsibilities of Applicants 5
7. Applicants' Anonymity 5
8. Mediation 5
9. Reviewing a Public Body's Use of Its Discretion .. 6
10. Appeal to Deputy Ministers 7

III Review Officer's Message - Privacy 9

IV The Review Officer's FOIPOP Performance Appraisals of Public Bodies 11

V Outside Activities of Review Officer 12

VI Recommended Changes in Legislation 12

VII Summaries of Selected Reviews and Mediation 13

1. Mediations 13
2. Fee Waiver 13
3. Citizens' Meeting 13
4. Reviews 14

VIII Recent Court Decisions 19

IX Our Website 22

X Staff of the Review Office 22

XI Statistics 23

FREEDOM OF INFORMATION:

"(T)he legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada."

(Justice Saunders O'Connor v. Nova Scotia, 2001 NSCA #132)

The overarching purpose of access to information legislation... is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process and secondly, that politicians and bureaucrats remain accountable to the citizenry.

(Justice Gerald La Forest in Dagg v. Canada (Minister of Finance [1997] 2 S.C.R. 403).

Parliament and the public cannot hope to call the government to account without an adequate knowledge of what is going on: nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.

(Professor Donald Rowat's "How Much Administrative Secrecy?" (1965) 31 Canadian Journal of Economics and Political Science 479, at p. 480)

PROTECTION OF PRIVACY:

The protection of privacy is a fundamental value in modern, democratic states... an expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy – the freedom to engage in one's own thoughts, actions and decisions. (Justice La Forest in Dagg above.)

INTRODUCTION:

This Annual Report is laid before the House of Assembly in accordance with Section 33(7) of the *Freedom of Information and Protection of Privacy Act*. The Review Officer is an independent ombudsman, appointed by Order-in-Council for a period of not less than five years. Although not appointed by a vote of the legislature, he can be removed from office by the Governor-in-Council only following a House of Assembly resolution by a vote of the majority of the members of the House.

The Review Officer reviews decisions of public bodies and local public bodies (hospitals, universities, school boards and colleges) with respect to applications for access to information under the *Act*. The Review Officer may make recommendations to public bodies following a review.

In my first Annual Report to the Legislature, for the period January 1, 1999 to October 1, 2000, emphasis was placed on access to information. In this Report I will, given the prevailing view that privacy is becoming a major social issue in Canada and other countries, spend more time discussing the need to address privacy protection issues. But first to access.

REVIEW OFFICER'S MESSAGE - ACCESS:

One would think that given the sentiments of Justice La Forest and the purpose of the Act as noted by Justice Saunders with respect to access to information, and echoing statements found in other Nova Scotia Court cases, that the Review Officer's Annual Report would contain nothing but fulsome praise for the openness and accountability shown by public servants. While I have no evidence that obfuscation and delay by bureaucrats are deliberate, a lack of interest in the legislation exhibited by more than a few public bodies, reflects an attitude that damages its purpose.

The FOIPOP Administrator:

I have urged senior bureaucrats to lend more support to the people who administer the Act within their departments. FOIPOP Administrators should be regarded as part of the management team. In some cases they are, because their primary jobs are senior and they have regular contact and influence with senior bureaucrats and deputy ministers as a result of those primary responsibilities.

Some have the power to make decisions though I suspect they deem it judicious to pass it by their Deputy Ministers. Other FOIPOP Administrators are staff with little experience with this legislation and, consequently, are overly defensive with both applicants and the Review Office. (In one case, recently, the administrator was a part time employee who neither understood the Act nor expected to be assigned to administer it.) They are also inadequately trained. I place no blame on the Government's co-ordinator for the Act, a member of the Department of Justice staff, who does not appear to have sufficient resources to handle the responsibilities of the position.

Another downside with untrained and inexperienced administrators is their inclination to leave it to the Government's co-ordinator to help them reach a decision. I expect some consultation to take place from time to time, but applications passed through the co-ordinator can not only result in unavoidable delays with the process, but can result in little variation in public bodies's decisions and subsequent representations to the Review Officer. Many of the exemptions from disclosure under the Act expect a public body to use its discretion. The dictionary defines discretionary as "left to one's own judgement". No one should expect public bodies to make identical judgements.

FOIPOP administrators frequently cite the wrong exemptions or, to avoid this, decide to cite many exemptions in order to be sure of capturing the right one. As the Review Officer I do not suggest exemptions to a public body unless it involves what I regard as a personal privacy exemption.

Some examples of mistakes by administrators:

- an administrator has claimed solicitor-client privilege on all letters written by a deputy minister because the deputy minister happens to be a lawyer;
- several administrators have left the impression with applicants that their application is being denied because a third party refused to consent to disclosure. Third parties have no powers to make decisions with respect to applications. Only public bodies can do that and they are free to override objections from third parties.
- Section 21(1) is still misunderstood by some administrators. The Review Officer, with the support of the Supreme Court, has told public bodies that all three subsections of s.21(1) have to apply before the exemption can stand.

◊ a public body, having received the Review Officer's Report with a recommendation for disclosure, informed the applicant that it was now awaiting consent from third parties before deciding whether to accept the recommendation. It is the public body's responsibility, once a Report with recommendations is received, to make a decision and to inform all parties of that decision. The Act allows thirty days for an appeal of that decision to the Nova Scotia Supreme Court.

Review Office's Information Sessions:

The Office has been offering specialized training to FOIPOP Administrators with respect to the review process. Susan Woolway, our mediator/investigator, spearheaded the training offers and conducts the session with our case review analyst, Lynn Prime. They have now done six training sessions involving some fifteen administrators. Some local public bodies have taken up our training offer with alacrity and their determination to learn the ropes and fulfill their obligations under the Act is an example to all public bodies.

Legal Counsel:

Some local public bodies and public bodies have left it to their legal counsel to deal with applications and to make their cases to the Review Officer. The raison d'etre of legal counsel who work for public bodies is to protect the interests of the institution. As worthy as that role is, it also tends to bring an adversarial approach which is not helpful to an ombudsman. The legal counsel role may not easily lend itself to the mediation process, an important part of this office's function. The interests of the Review Office and the public bodies through their FOIPOP Administrators, are ultimately the same, to ensure public bodies are open and accountable to the public. This is a responsibility laid on both the Review Officer and the public bodies by the legislature, not by the Review Office. As an ombudsman, one without the power to make binding rulings, it is essential that the Review Officer has access to staff with an intimate knowledge of the information being sought. I can add, from experience, that my conclusions are influenced most often by the people who are "in the trenches".

In establishing the Review Office, the government of the day expected the review process to be conducted informally. I have used this approach from the start. Although the Act allows the

Review Officer to have hearings, I have felt that an applicant would be at a disadvantage appearing at a hearing with public body representatives, likely accompanied by legal counsel. Information and Privacy Commissioners with powers to make binding rulings are, of course, required to hold hearings if mediation fails. This is not to say that legal advisers do not add valuable interpretations and opinions during the review process.

Fees:

The Government is to be commended for not increasing fees for access to documents. While I am not against fees for access I am convinced that an increase in fees would harm the interests of the Act. Fees are an easy target if a government wishes to engage in cost recovery or to reduce the work placed on departments by access requests. There is no evidence anywhere in Canada that increased fees go near to recovering costs. To shift the cost of administering access to information from the general tax base to users of the system would not be in any party's best interests. It must be considered a cost of providing effective government.

There are those who argue that citizens have already paid for access through their taxes and should not have to pay fees. My own view, and that of other Information and Privacy Commissioners in the country, is that fees are appropriate as long as there is a balance between an effective right of access and assurance that the right of access does not unduly burden a public body. In any case I have had few appeals of fee charges and frequently agreed that the fees were justified. Public bodies, generally, have acted responsibly in applying fees and I hope that continues.

Public Body Response to Applicants:

Too many public bodies, too often, think that citing and quoting exemptions to an applicant is sufficient. The Supreme Court of Nova Scotia does not agree. I have cited many times in my reviews, the words of Justice Edwards in *McCormack v. Nova Scotia (Attorney General) et al.* (1993) 123 N.S.R. (2d)(271) in which he said that responses "should detail for the applicant the reasons why the particular exemption is operative. Mere recital of the words of the relevant section is not enough".

Public bodies should remember that many applicants are not familiar with the Act and therefore should be given clear reasons

why an application has been denied so that they can prepare arguments for the Review Officer if they choose to ask for a Review.

Responsibilities of Applicants:

Many applicants fail to make adequate representations to the Review Officer to support their cases. I have forgiven the private citizens who are unfamiliar with the Act and who are satisfied that a public body's decision is undergoing an independent review. But I expect more from other users (journalists, commercial companies, lawyers and politicians), who should understand that the Review Officer's conclusions are influenced by the quality of the representations he receives from public bodies and applicants alike. Those four categories of applicants should be familiar with the Act. They also have the resources to provide a timely and thorough representation.

Applicants' Anonymity:

I have expressed my view before that the names of applicants are circulated through public bodies more than is necessary and comments I have heard indicate there is reason for concern. I see no reason why anyone but the administrator who receives an application needs to know the identity of the applicant. "Who is asking?" is an irrelevant and perhaps inappropriate question to ask. To address concerns about ministers and deputy ministers being prepared for public comment, the name of the applicant can be disclosed after a decision on an application has been made. Those Deputy Ministers who make the final decision on access requests could do so, and perhaps should do so, without knowing the name of the applicant. We have seen evidence that the names of applicants are sometimes spread throughout a public body and beyond, unnecessarily.

Mediation:

During the mediation stage of the review process, the Review Office investigates the circumstances of a review request and attempts to effect either a full settlement of all issues between the parties or the simplification of the review through any or all of the following:

◊ settlement of some issues;

- ◊ reduction of the number of records in dispute;
- ◊ clarification of the issues;
- ◊ education of the parties, leading to better understanding of the issues and the Acts.

Section 35 of the provincial Act and section 489(2) of the municipal Act give the Review Office the authority to mediate.

The Review Office is committed to mediation as a preferred method of dispute resolution. When reviews are settled by mediation there is usually a high degree of satisfaction among the parties. Mediation allows for flexibility and provides opportunity for creative solutions. It's sometimes less intensive and time consuming for a public body than the review process.

The mediation process, which should be encouraged by all public bodies, allows applicants and public bodies to craft their own agreements. Mediation gets at the heart of the matter and tries to find the common ground which satisfies the "interests" of all parties and not a settlement of their "rights".

The Review Officer does not become involved in a file until mediation efforts are exhausted or the thirty day period for mediation runs out.

In this report you will find the statistics on the success of the mediation process.

Reviewing a Public Body's Use of Its Discretion:

During the past year I was challenged again on my right to review a public body's use of discretion. The argument of the public body was that because the Act gives public bodies the right to use their discretion with respect to non-mandatory exemptions, the Review Officer has no role to play in reviewing that use. Section 32(1) permits anyone who has made an application pursuant to this Act to ask for a review of "any decision, act or failure to act of the public body that relates to the request". I interpret this to mean that every decision of a public body can be reviewed by the Review Officer and, if appropriate, challenged. Section 42(6) of the Act makes it clear that the Nova Scotia courts cannot substitute their discretion for that of the public body. But Section 39(2) allows the Review Officer to make any recommendations with respect to the matter under review including recommendations regarding a public body's use of discretion.

McNairn and Woodbury's *Government Information: Access and*

Privacy, on page 6-10 states:

> *"In those jurisdictions where the investigative approach is followed, the reviewing officer can properly address the question of whether discretion should have been exercised in favour of the requester. It would be perfectly appropriate for the report of the reviewing officer to recommend just such an exercise of discretion by a government institution."*

The Department of Justice, in a recent communication, said that, in its view, the Review Officer's authority includes investigating whether a record falls within an exemption and whether a head of a public body should give access to a record. The Department, however, believes a public body's requirement to prove "harm" should be limited only to those exemptions that specify a "harm" test. My own view as an ombudsman is that if disclosure does not harm the interests of a public body then the information should be provided, perhaps even as a matter of routine disclosure.

APPEAL TO DEPUTY MINISTERS:

As I did in my first Annual Report I appeal to deputy ministers to speak out in their departments in support of this legislation and to offer encouragement to their administrators. I understand a senior bureaucrat in the Department of Finance has done that. Deputy ministers and senior bureaucrats are busy people with many pressures on them. But it must be recognized that this is an important Act, requiring their public support.

Former Justice La Forest's comments on bureaucrats' accountability to the public may be uncomfortable for officials schooled in the doctrine of ministerial accountability. But, to paraphrase others, government officials and officials of other public bodies can no longer stay sheltered in the shadows.

I conclude this section of my annual report with comments and observations made to a "Right to Know" conference in Melbourne, Australia by one of Canada's foremost experts in access legislation. Professor Alisdair Roberts, formerly of Queen's University in Kingston, Ontario spoke of the challenge to access when traditional government functions move to the private sector. At the federal level he mentioned specifically food inspection, airports, air traffic control, the provision of blood and blood products and the operation of prisons. Governments in all provinces have determined that

moving some government functions to the private sector makes economic sense. But the result can be that access laws become less and less effective as more records that affect the public's interests are moved out of government control.

A previous administration created the Highway 104 Corporation and placed it outside the reach of this Act. When an applicant asked for information with respect to the new highway and was not satisfied with the response, he asked for a Review. During the Review I discovered that the relevant documents could be found in the files of the Department of Transportation and Public Works and that the Department was obliged to accept the application because the records were in its custody and under its control. If the documents had been passed over to the Highway 104 Corporation and out of reach of the Act, the problems addressed by Professor Roberts would have arisen.

I noted in my first Annual Report that Parliament had recently passed legislation, the *Personal Information Protection and Electronic Documents Act (PIPED)* which extended obligations for the protection of personal privacy beyond public bodies to the private sector. The Act became law on January 1, 2001. This law requires a company to be up front and transparent about how it handles personal information. It covers federally regulated businesses such as airlines, banks, and telecommunication firms, as well as any business that transfers personal information across provincial or national borders. The Act will apply to the provinces on January 1, 2004, unless a province passes similar legislation.

Just as government moved to extend citizens rights to privacy to the private sector in *PIPED* so should it move to protect citizens rights to access when government functions move to the private sector.

> *"The primary consideration is that in a democracy legitimacy lies with the citizenry. That is what makes a democracy superior to other forms of social organization and the process which leads to important decisions is not simply supposed to include the citizen, it is supposed to use the intelligence of the society which lies within the legitimacy of the citizen in order to minimize the chances of making major mistakes. That is the primacy characteristic of a democracy. That use of the citizenry's intelligence is what differentiates a democracy from the various sorts of dictatorships,*

whether direct and brutal or sophisticated and managerial in the corporatist's mode.

[John Ralston Saul's "Reflections of a Siamese Twin - Canada at the End of the 20th Century" (1997) (Viking Publication) at p 460]

THE REVIEW OFFICER'S MESSAGE - PRIVACY:

"In fostering the underlying values of dignity, integrity and autonomy, it is fitting that section 8 of the Charter (Canadian Charter of Human Rights and Freedoms) should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

The constitutional provision of s.8 has at its heart the protection of privacy, anonymity and dignity of the individual."

(Justice Sopinka in R. v. Plant (1993) 84 C.C.C. (3d) 203 at pp, 211-213.)

As I noted in my introduction to this Report, privacy advocates and parliamentarians alike agree that people's right to privacy is becoming a dominant issue in Canada. The Parliament of Canada recognized this when it passed the *PIPED*, the acronym for the legislation requiring businesses to follow certain rules in the collection and use of personal information. Nova Scotia is expected to pass similar legislation by 2004 unless it chooses to adopt the federal legislation.

The safeguards against the disclosure, collection and disposal of personal information found in Nova Scotia's *Freedom of Information and Protection of Privacy Act* were created when the electronic age was young and untested, when the new technologies available today were just that, new. Now the threats to privacy are all around us and peoples' concerns are being heard. A former federal Privacy Commissioner believes:

> *"You can have a perfect society and perfect order and perfect control if that is what you want, but what you give up is any vestige of your rights as a free autonomous, unique human being. We really have to take a hard look at how we are doing it".*

Threats to our privacy come from all around us, often from the well intentioned.

Recently I and other information and privacy commissioners expressed our concerns to Statistics Canada and provincial departments of education about a plan to track university students from the time they leave high school on into the work force. This tracking will, I am told, help governments make more sense of the big dollars they spend on education. The Enhanced Student Information Program (ESIS) was developed by StatsCan under the aegis of the Canadian Education Statistics Council and replaces the former post secondary enrolment and graduate surveys of universities, community colleges and trade/vocational institutions with a single survey. The data base will collect information on students prior to their attendance at a post secondary institution (the high school they came from or, in the case of foreign students, the country they came from). ESIS will continue tracking students for twenty years after their post secondary education. Not quite "womb to tomb" but close. StatsCan has been urged and has agreed to ensure students sign a consent form and that the consent form will be clear and precise. It is my understanding students will be able to opt out of the tracking system even after they have agreed to participate.

The Nova Scotia Department of Health is aware of peoples' rights to privacy of their health information - likely a citizen's most protected information - as it sets up a health data sharing arrangement with all hospitals in the Province. The Department has invited me to comment and I am encouraged by what I have heard so far. Other provinces, recognizing the importance of keeping patients' health information private, have enacted Personal Health Information Acts. Some provinces have also committed themselves to completing personal privacy impact assessments (PIA's) before establishing new government programs.

It is obvious to me, as it is to others, that Nova Scotia needs a Review Officer mandated to investigate privacy complaints and to be consulted on government plans with a possible privacy impact,

as well as to review access to information decisions.

In the absence of any other independent review process for privacy complaints, in my view, it is now urgent that the legislature provide the Review Officer with the mandate to do what he is already partly engaged in. With respect to consultation, the decision to consult or not to consult should not be left to the public body.

I hope this recommendation can be acted on as soon as possible. Manitoba's Ombudsman, whose responsibilities include the investigation of access and privacy complaints, noted in his 1999 annual report that privacy complaints increased 25% during the year. There is no reason not to expect the same to happen in Nova Scotia, and we need to be prepared.

THE REVIEW OFFICER'S FOIPOP PERFORMANCE APPRAISAL OF PUBLIC BODIES:

It is impossible for this Office to rate the performance of all public and local public bodies on their handling of applications but it is possible to recognize their performance during the Review process. It should be kept in mind that a public body whose decisions have not been appealed to the Review Office, could have a high compliance rate. Acceptance of the Review Officer's recommendations was not a factor in the rating, nor should it be.

Rating high are:

- The Annapolis Valley Regional School Board which is pushing for routine disclosure of documents instead of disclosing only in response to FOIPOP applications.
- The Halifax Regional Water Commission which is revising the structure of its minutes and considering making them available on a web site or at their offices.
- The Halifax Regional School Board whose FOIPOP administrator is beginning a training course for Board officials.
- The University College of Cape Breton whose administrator has accepted the challenge of FOIPOP applications and privacy complaints with enthusiasm and openness.
- The Departments of Justice, Finance and Community Service for their professionalism in dealing with applications.
- A special mention to the Department of Environment and Labour. A recent amalgamation of the two departments, both of which

had been accustomed to handling a considerable number of applications for access, provided a challenge which the Department met.

Those rating less than satisfactory, in my view, are:

- ◊ The Department of Economic Development which needs to revamp its procedures for dealing with applications.
- ◊ Dalhousie University for delays in responding to applications and in providing documents and representations to the Review Office.
- ◊ The Town of New Glasgow which forced the Review Office to consider, for the first time, exercising powers under Section 38(3), to ask the Nova Scotia Supreme Court to order a public body to provide records in its custody to the Review Officer on request.

OUTSIDE ACTIVITIES OF THE REVIEW OFFICER:

- ◊ In December, 2000 I sat on a panel at the annual meeting of the Council on Government Ethics Law, a U.S.- Canada council, in Tampa, Florida.
- ◊ In February, 2001 I was invited to St. John's, Newfoundland to meet with a Government-appointed Committee examining proposed changes in that province's access and privacy legislation.
- ◊ In June I attended the annual meeting of Canada's Information and Privacy Commissioners in Yellowknife, NWT.
- ◊ In October I was the keynote speaker at the annual meeting of the Nova Scotia Librarians' Association meeting in Sydney, NS.

RECOMMENDED CHANGES IN THE LEGISLATION:

- ◊ The Review Officer be provided with explicit powers to investigate and report on privacy complaints.
- ◊ The Review Officer be provided with the power to delegate the right to review documents to the staff of the Office; and to have confidentiality oaths administered to the Review Officer and staff. (During a review of a decision, a local public body challenged the right of the staff of the office, with the exception of the Review Officer, to review documents. Some documents were refused to our Mediator/Investigator.)

SUMMARIES OF SELECTED REVIEWS AND MEDIATIONS:

Mediations:

Witness Statement - Third Party Appeal

The Public Prosecution Service received a request for all files relating to an assault at a local bar. The PPS notified a third party who had provided a witness statement and sought her views regarding disclosure of the record.

In the absence of a reply from the third party, PPS decided to partially release the records with severances under s.20 (personal privacy).

The third party then objected to the decision to give access and filed a third party request for a review.

During mediation it became clear that the third party's objection was only to a few lines in the documents which she believed contained personal identifying information about herself.

The PPS agreed to sever the additional lines and the third party withdrew her request for a review.

Fee Waiver:

The Applicant had asked for a large volume of material from the Annapolis Valley Regional School Board relating to the tendering of a transportation contract. The School Board prepared a fee estimate in accordance with Section 11(2) of the Act and Regulation 6.

The Applicant appealed the fee estimate to the Review Office citing public interest and financial circumstances as factors favouring a complete fee waiver. The Applicant agreed to reduce the time period for the documents being sought, but the volume of material did not diminish significantly.

After discussions with both parties on the purpose of the Act and the responsibilities and expectations of the parties, the School Board agreed to cut the fee by half. The Applicant agreed the amended fee was now reasonable and he withdrew his request for review.

Citizens' Meeting:

The Applicant asked the Department of Transportation and Public Works for information on the paving of a street in his neighbourhood.

He wanted to know how the contract was awarded, who the successful contractor was and how the costs were broken down between the province, the municipality and the residents of the street.

The Department provided some details but not the financial breakdowns citing exemptions under s.21. It claimed this information was commercial information which, if disclosed, would financially harm third parties.

The Applicant was adamant, indicating other residents of his street required the same information. After discussing the matter with the mediator, the Department agreed to have one of its chief construction managers meet with the Applicant. The mediator spoke to both parties and a meeting was arranged between the construction manager, interested residents from the street, the local municipal councillor and other representatives of the Department.

As a result of the meeting the applicant agreed to withdraw his request for review.

REVIEWS:

Report - FI-01-04 - Review regarding Disclosure of Salaries of Senior Officials at Acadia University.

THE ISSUE: Whether Acadia University acted in accordance with the Act when it published all employee salaries in a book for which it was charging $400.00.

A journalist asked Acadia University to disclose documents showing the current salaries and benefits of all senior administrative staff at the Dean and Director level and above.

In its response the University told the Applicant that access to university salary information did not require an application under the Act because the information was published in booklet form at a cost of $400.

Section 4(2)(a) of the Act states the Act does not apply to material which is published or material that is available for purchase by the public.

The Applicant said she did not want the salaries of all employees of the university, which the book contained, but only a few, and that she should not have to pay for it.

The Review Officer agreed with the University that the information did not fall under the Act because it was published material but was critical of the approach taken by Acadia. The

question was raised that given the purpose of the Act, " to ensure that public bodies are fully accountable to the public by giving the public a right of access to records", was information sold for $400 really accessible to the public? The Review Officer felt the price presented an economic barrier to that information.

The Review Officer recommended that the University reconsider its decision to charge a prohibitive price for information otherwise accessible under the Act, and provide the information to the Applicant charging the appropriate cost recovery fees permitted.

The University indicated it would consider the recommendations.

Report - FI-01-19 - Review of a decision by Dalhousie University to deny access to documents used in a first-term survey of a university department.

The Issue: Whether the exemptions cited support the decision to refuse to disclose to the Applicant his own personal information gathered during a performance review of a university department.

The Applicant was denied access to copies of letters from fourteen faculty members to the survey committee which completed a "first-term survey" of the University's department of which he was head.

The University cited exemptions under s.19C, a relatively new amendment to the act, and s.20 which is designed to protect a third party's personal privacy. With respect to s.19C the University argued that its "peer review" process would be harmed because providing the information to the Applicant would discourage frank representations to a survey committee. With respect to s.20, the University said the letters from faculty members were provided on the understanding that they would be kept confidential but agreed to disclose letters from members who had no objections to disclosing them to the Applicant.

In his Report the Review Officer agreed with the Applicant that s.19C did not apply to "peer reviews" because the section was "carefully worded to make it clear what the purposes of the 'evaluative or opinion material' must be and did not include an evaluation of the Applicant's management of the department".

The Review Officer also concluded that the letters requested contain the personal information of the Applicant himself and, only peripherally, the people who wrote the letter whose names could be severed to protect their privacy. He found that information contained in records that might to characterized as personal

recommendations or evaluations is personal information of the person they are about and should be disclosed to the Applicant.

The Review Officer determined that it was not possible to guarantee the privacy of the writers of the letters all of whom were known anyway to the Applicant. He said "(a) public body can only expect reasonable assurances of security of personal information of third parties".

The recommendations of the Review Officer for disclosure were rejected.

Report - FI-01-102 - Review Regarding Disclosure of an Internal Discipline Investigation Report done by the Nova Scotia Police Commission for the Board of Police Commissioners for the Town of Springhill.

The Issue: Whether the privacy of public officials outweighs the public interest in knowing why the Town's Police Chief was suspended.

An individual asked the Nova Scotia Police Commission for a copy of the internal discipline investigation report completed as a result of a complaint received from the Board of Police Commissioners for Springhill about the Town's Police Chief.

Following the request for an investigation but before the report was completed, the Police Chief was suspended and subsequently resigned.

The Police Commission refused to disclose the report deciding it would be an unreasonable invasion of a third party's privacy under s.20(3)(d) and (g) of the Act.

During the review the Review Office discovered that the affected third parties had not been contacted by the Police Commission to determine if they had any objections to the release of the report or if they would consent to its release. The Review Office, with the assistance of the Police Commission, contacted the third parties. It was determined that out of a number of third parties only two had objections to the report's release and one was a member of the Springhill Board of Police Commissioners and the other was the Acting Police Chief.

The Review Officer found that the concerns of the objecting third parties were captured by s.20(4)(e) as the information related to their position and function as employees or officers of a public body. Therefore the disclosure of such information would not be considered an unreasonable invasion of their personal privacy.

The Review Officer recommended the report be released as disclosure was clearly in the public interest and the main third party, the former Police Chief of Springhill had consented to the report's release.

The Nova Scotia Police Commission accepted the recommendation. The Board of Police Commissioners for Springhill initially filed an appeal but has since withdrawn it and the report has been released.

Report - FI-01-81 - Review Regarding Disclosure of Tape of a 911 Emergency Call - Department of Health

The Issue: The right to privacy of the deceased.

A journalist asked the Department of Health for a copy of a 911 call which concerned a murder/suicide.

The Department refused to provide the tape citing s.20(1) because disclosure would be an unreasonable invasion of the deceased's personal privacy.

The journalist argued that he hoped to use the tape in a documentary he was producing and that much of the information on the tape was now public information.

The Review Officer concluded that releasing the tape would be an unreasonable invasion of not only the deceased's privacy but also the personal privacy of the caller. FOIPOP decisions on access to 911 calls were reviewed from other Canadian jurisdictions and it was concluded that unless the tape contained the personal information of the Applicant, it was not to be disclosed.

The Review Officer confirmed that the deceased have privacy rights and concluded that disclosing their personal information would be unreasonable except under compelling circumstances.

The Review Officer confirmed the decision of the Department.

Report FI-01-68 - Review regarding a decision by the Department of Finance regarding offshore oil benefits - Department of Finance.

The Issue: The limiting of the definition of "background information" to "factual information".

The Applicant asked the Department of Finance for documents related to analyses of the fiscal benefits of the offshore oil industry. He was provided with documents which were severed because, in the Department's view, they fell under exemptions found in s.14(1) (advice), and s.17(1)(e) (harm to negotiations of a public body).

The Review Officer found that the Department interpreted "background information" as "factual information" only. Sub-section 14(2) requires a public body to disclose background information used in its considerations. He wrote that the information denied included statistical surveys, appraisals, economic forecast and a plan or proposal after the plan had been either approved or rejected. During the Review the Review Officer learned that a prediction (economic forecast) was contained in the disclosed information and concluded that the Department could not argue that the disclosure of other predictions should be denied.

It was in its representation to this review that the Department raised the issue of the Review Officer's right to review a public body's use of discretion. The Review Officer's observations on this are found in this annual report.

The Department partially accepted recommendations for disclosure.

Report FI-01-30 - A Review of a decision of Dalhousie University to deny access to a report ranking the performance of first year Nova Scotia students.

The Issue: Whether Dalhousie offered sufficient proof that disclosing records that compare the performance of first year students would harm the university's financial or economic interests.

The Applicant asked for records that rank high schools in Nova Scotia according to their academic excellence, including records that compare high school marks of new Dalhousie students with their achievements at University. The University argued that a misinterpretation of the records could lead to a reduction in enrollment and subsequent financial harm. I found that the marks reported for each school were median grades and that a careful reader was not likely to conclude that all students who enter Dalhousie receive lower marks that they did in high school.

I recommended that Dalhousie disclose more information. The recommendation was rejected.

RECENT NOVA SCOTIA COURT DECISIONS:

Gatemaster Inc. v. Nova Scotia (Department of Housing and Municipal Affairs) [2000] 182 N.S.R.(2d) 156.(S.C.)

The Appellant is a credit reporting agency which provides a credit information service to subscribing landlord clients. The Agency sought landlord information for all multi-unit residential buildings in the province including landlord names and rental addresses, number of apartments in each unit, assessed values, date of acquisition and book and page number of the deeds. The Department of Housing and Municipal Affairs, now Service Nova Scotia and Municipal Relations, agreed to provide some of the information but not names and personal addresses. The Appellant appealed.

The appeal was dismissed. The Court found that the information was a matter of public record since it was available to the public through Registry of Deeds offices and municipal tax offices throughout the province. Since the information was a matter of public record the Act did not apply.

Although the Court could have stopped there, it went on to consider whether, if the Act did apply, the disputed information would be protected under s.20 as personal information.

The Court first decided the information was personal information as defined in the Act. It then turned to the various subsections of s.20.

Section 20(3) presumes that disclosure of certain types of personal information is an unreasonable invasion of personal privacy unless proven otherwise. The Court found the requested information came under s. 20(3)(e) as it was a type of personal information gathered for the purpose of collecting a tax, in this case a property assessment tax.

The Court considered whether or not the Appellant had either through proof or argument rebutted the presumption contained in s.20(3) that disclosure of this type of information would be an unreasonable invasion of privacy. The Court found the Appellant had not presented the necessary proof or argument and the presumption that it would be an unreasonable invasion of privacy if the requested information was released stood.

The Court also found that the Appellant's proposed use of the information was not a use compatible with the purpose for which the information was obtained as required in s.28.

O'Connor v. Nova Scotia 2001 NSCA #132

In this decision the Court of Appeal gives its interpretation of s.13(1) and (2), the exemption for Cabinet confidentiality and the test to be applied for such an exemption.

The Government, through its Planning and Priorities Secretariat, undertook a critical review of all its existing programs. In a two-phased approach it first identified the purpose, cost and policy objectives of each program and then categorised the programs according to their merit. Eighty-six programs were eliminated.

The Appellant requested the disclosure of information pertaining to this process. Priorities and Planning provided some information and following recommendations made by the Review Officer, disclosed more but not everything. The government maintained that the undisclosed information was protected by s.13, Cabinet confidentiality. The Appellant appealed to the Supreme Court of Nova Scotia.

In his decision Justice MacDonald ordered the production of information relating to the review of the 86 government programs that had been eliminated. He found that the material did constitute advice given and/or recommendations made to the Cabinet's Priorities and Planning Committee by its Secretariat, but that access to it should be granted because the information sought in relation to those 86 discontinued programs constituted background information for the purpose of presenting explanations or analysis to Cabinet for consideration in making a decision that had already been implemented. He upheld the government's refusal of access to material concerning the roughly 1,000 other programs yet to be reviewed.

Both parties appealed to the Nova Scotia Court of Appeal.

In its decision the Court of Appeal held that the test to be applied to determine whether information falls under s.13(1) is to ask " Is it likely that the disclosure of the information would permit the reader to draw accurate inferences about Cabinet deliberations? If the question is answered in the affirmative, then the information is protected by the Cabinet confidentiality exemption under s.13(1)."

The Appeal Court stated that s.13(2) is an exception to the exemption and if one concludes that the requested information falls under s.13(1), one then considers whether the information falls under any of the exceptions set out in 13(2). The Appeal Court agreed with the chambers Judge that the only relevant portion of s.13(2) which applied to this case is:

S.13(2) Subsection (1) does not apply to

(c) background information in a record the purpose of which is to present explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if:

(i) the decision has been made public,

(ii) the decision has been implemented,

The Appeal Court indicated that the list contained in the Act of what defines background information is a complete and exhaustive one. The Court was not prepared to upset the lower Court's finding that the requested material fit the definition of background information. Since the information had been found to be background information, and it was background information on decisions which had already been implemented and made public, the Court found it should be released. The requested information fit the exception to the s.13 exemption.

Keating v. Nova Scotia (Attorney General), 2001 NSSC 85 (S.C)

This was an appeal of a decision of the Department of Justice not to release certain information relating to the provincial government's Compensation to Victims of Institutional Abuse program. The Appellant was aware that allegations of abuse had been made against him in the alternative dispute resolution process undertaken by the Province with respect to his former employment.

The Review Officer had recommended the disclosure of much of the disputed information. The Department did not follow these recommendations and the Appellant appealed to the Supreme Court.

A significant portion of the information dealt with personal information covered under s.20. The Court laid out the 4 step analysis of s.20 which has been established and refined in earlier cases.

The first step is to decide whether the requested information is personal information as defined under the Act. The second step is to determine if any of the factors in s.20(4) are present. If so, the documents must be disclosed.

Justice Gruchy found the information was personal information as defined in the Act and further found the complainants had consented to the disclosure of this information by signing release forms whereby the information supplied could be used for various purposes. All of which potentially involved public disclosure or

disclosure to the Appellant. Since written consent is a factor under s.20(4), the section was triggered and it was unnecessary to proceed further with the four-step analysis. The Court ordered the release of information in all cases where the complainants had signed release forms.

The Court stated that under the circumstances there was no unreasonable invasion of the complainants' privacy and the Appellant was entitled to know what he had been accused of and should have the right to correct the record.

The Review Officer, who frequently deals with claims for exemptions under s.13(1), finds the test laid down by the Court of Appeal in *O'Connor* to be a welcome addition to the relevant case law in Nova Scotia and of great assistance to the Review Office.

OUR WEBSITE:

We are grateful to Communications Nova Scotia for its assistance in establishing our Website. It may be an exaggeration to say it is "up and running" but it is certainly up and walking. Look to www.gov.ns.ca/foiro/ for samples of our Reviews (others can be found in the legislative library and on QuickLaw), our Annual Reports, and other news from the Review Office. We do not have the human resources to do our own input and are still depending on Communications Nova Scotia for help.

STAFF OF THE REVIEW OFFICE:

Darce Fardy	Review Officer
Susan Woolway	Mediator/Investigator
Lynn Prime	Case Review Analyst

STATISTICS:

You will notice in the statistics the growing number of Requests for Review handled by the Review Office in a twelve month period. The 163 Requests represents an increase of about 30% over the twelve month period October 1, 1999 to September 30, 2000.

We welcome the increase, and the attendant increase in applications, as a sign that more citizens are showing an interest in the activities of their government and other public bodies. Staff are to be commended for taking on the training sessions while, at the same time, handling the increase in Requests for Review.

Appeals for the Period of October 1/00 - September 30/01

Year Comparison

1995	1996	1997	1998	1999	2000	2001 (Oct 1/00 to Sept 30/01)
54	86	102	122	116	125	163

Files Completed from October/00 - end of Sept/01 - TOTAL =151

private citizens	journalists	politicians	organizations
88	33	16	14

Issues

Time extension	Refusal to disclose/ severing	Adequate search/no records exist/custody & control	3rd Party review	Fee waiver	No response in 30 days/ handling of request	Not a public body
3	99	8	9	16	15	1

Recommendation Status

Total reports written	Recom-mendations accepted	Partial acceptance	Recom-mendations rejected	Agree with dept.	Waiting for decision	Reprimand for handling no recom-mendation
102	29	7	18	43	1	4

Mediation/Withdrawn

Reviews mediated successfully	Partial mediation success	Reviews withdrawn/closed
40	17	9

Appeals Broken Down by Individual Departments

Speaker's office	1
Western Regional Health Board	1
Service Nova Scotia & Municipal Relations	11
Justice	19
Health	6
Community Services	8
Education	2

Sysco	1
Petroleum Directorate	1
Economic Development	7
Natural Resources	3
Environment & Labour	27
Tourism & Culture	2
Police Commission	2
Finance	3
Agriculture & Fisheries	2
Premier's Office	2
NS Legal Aid Commission	2
Transportation	8
PPS	1
Canada/NS Offshore Petroleum	1
Family & Children's Services (Lunenburg)	1
JAG	1
Halifax Regional Water Commission	1
NS Gaming Corporation	1
Intergovernmental Affairs	1

Appeals For Local Public Bodies (Hospitals, School Boards, Universities)

Halifax Regional School Board	2
Annapolis Valley Regional School Board	3
Dalhousie University	3
Acadia University	3
NS Community College	4

Appeals Under Municipal FOIPOP

Town of Middleton	1
Municipality of West Hants	1
Cape Breton Police	1
Halifax Regional Police	2
Municipality of Colchester	1
Municipality of Lunenburg	1
Halifax Regional Municipality	5
Municipality of Kings	1
Village of Bible Hill	1

FOIPOP Application Statistics to end of Sept 01*

***Note:** These are the responses we received from approximately 80 requests for statistics.

Universities and School Boards

Name	Number	Full	Partial	Denied	Withdrawn	Other	Transferred
Annapolis Valley Regional SB	9	2	2		4 (1 on hold)		
Cape Breton-Victoria SB	7	6		1 (told letter could be placed in file)			
Chignecto-Central SB	9	1				2 - no info: 3 public info: 1 no response on fees	2
South West Regional SB	6	3	1		2		
Acadia University	12	6	1	1		3 directed outside Act: 1 didn't have info	
Cape Breton College	9	6	2		1 (no fee attached)		
Conseil scolaire acadien provincial	4				3 (1 transfer)		
Mount Saint Vincent	6	5	1				
Saint FX University	14	10		2		2 didn't have info	
University of Kings	9	6			3		
Université Sainte-Anne	1	1					

DHA (District Health Authorities) & Hospitals

Name	Number	Full	Partial	Denied	Withdrawn	Other	Transferred
Guysborough Antigonish DHA	1	1					
Annapolis Valley DHA	2	2					
Cape Breton DHA	3	2				waiting payment	
IWK Hospital	2	1					
South Shore DHA	2	2					

Municipalities/Towns/Villages

Name	Number	Full	Partial	Denied	Withdrawn	Other	Transferred
Municipality of Antigonish	0						
Municipality of Barrington	0						
Municipality of Chester	0						
Municipality of Colchester	2						
Municipality of Digby	0						
Halifax Regional Municipality	28	16	4	4	2	2	
Municipality of Kings	9	3	2			3 fee not paid; 1 no info on file	
Municipality of Lunenburg	4	1		3			
Queens Municipality	1	1					
Pictou Municipality	3	1	2				
Municipality of Richmond	0						
Municipality of St. Marys	0						

Municipality of Victoria	0						
Municipality of West Hants	1			1			
Municipality of Yarmouth	0						
Village of Bible Hill	1				1		
Village of Canning	0						
Village of Pugwash	0						
Town of Amherst	1					ongoing	
Town of Antigonish	0						
Town of Berwick	1				1		
Town of Bridgewater	0						
Town of Bridgetown	0						
Town of Lunenburg	0						
Town of Mahone Bay	0						
Town of Middleton	1			1			
Town of Port Hawkesbury	0						
Town of Springhill	6	1		5			
Town of Shelburne	1				1		
Town of Stellarton	2	1		1			
Town of Windsor	0						
Town of Yarmouth	0						

NAME	NUMBER	FULL	PARTIAL	DENIED	WITHDRAWN	OTHER	TRANSFERRED
Police Services	30	20		9		1 incomplete 1 to review board	